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SUBJECT: JUNE 25, 2008 U.S.-RUSSIA JOINT DATA EXCHANGE
CENTER (JDEC) LEGAL EXPERTS MEETING

REF: 07 STATE 097376

¶11. (SBU) Summary: On June 25, a U.S. interagency delegation led by State/L conducted talks at the Russian Ministry of Foreign Affairs in Moscow to discuss liability provisions in the JDEC Memorandum of Agreement (MoA). Failure to resolve liability and taxation issues has been an impediment to the implementation of the U.S.-Russia JDEC and Pre-Launch Notification System (PLNS) agreements since their signature and entry into force in 2000. On June 25, the Russian legal experts agreed to use the "Joint Statement on Liability and Taxation Provisions" - that Acting U/S Rood presented to DFM Kislyak on May 19 in Oslo - as the basis for subsequent negotiations. The U.S. and Russian legal and policy experts made significant progress and the Russian side agreed ad ref to the liability provisions in the U.S. text - except as they related to possible claims against U.S. contractors. After initially resisting, the Russians agreed to a waiver of state-to-state claims and a qualified waiver of claims against USG personnel per the U.S. proposal, but asserted that U.S. contractors (especially those working on the construction of the JDEC) should not receive the same protections and instead should be subject to an insurance regime and Russian law. DoD's Office of General Counsel will assess the Russian position on U.S. contractors to determine whether it is consistent with the protections from exposure for U.S. contractors in other agreements/contexts and what language adjustments might be possible. (Both delegations agreed that in any event Russian subcontractors would be subject to Russian law.)

June 25 Morning Session

¶12. (SBU) U.S. Head of Delegation John Arbogast opened the meeting by reviewing the background and rationale for the liability section of the proposed U.S. JDEC "Joint Statement on Liability and Taxation Provisions." Russian Head of Delegation Alexander Bavykin said that Mr. Arbogast's review was useful in laying out the history of the issue and the U.S. approach and expressed the hope that the U.S. and Russian delegations could narrow their differences even if full agreement was not reached. He added that it was important to have the JDEC functioning in the near future. Further, for the Russians, liability was the most complicated issue, while taxation was less complicated. In laying out the Russian perspective, Bavykin said that the Russians understood that the portion of the U.S. draft dealing with liability had been drawn from the 2006 Plutonium Disposition Liability Protocol and that while this language was fine for dealing with nuclear matters, Russia was doubtful about applying its principles in the JDEC context because the JDEC did not involve nuclear materials. Arbogast replied that the United States had tailored its draft so that

there were no provisions that were nuclear specific and that the U.S. draft provided a framework for dealing with contingencies that could create liability concerns. He added that in drawing from the Plutonium Disposition Protocol the U.S. did not want to suggest that the risks of JDEC activities were in any way comparable to nuclear activities. He emphasized that the U.S. goal was to take already negotiated provisions in the context of a U.S.-Russian cooperative activity and to apply them to the cooperative activity of the JDEC. Arbogast also noted that to achieve complete liability coverage, the U.S. wanted to add a provision that incorporated the NATO-Russia Partnership for Peace Status of Forces Agreement (PfP SOFA) which would for example cover the issue of third-party claims. (NOTE: Although Russia agreed to be bound by the PfP SOFA in August 2007, its application and the significance of certain Russian "understandings" are currently being discussed within NATO forums.) Bavykin said that Russia saw liability as being mainly connected with the construction of the JDEC and asked what was the nature of damage the U.S. could foresee that would give rise to liability. Arbogast replied that the U.S. did not foresee catastrophic damage occurring during either the construction or operational phase, but there were things that could go wrong as is the case with any activity. Examples given included a drunken visitor to JDEC destroying computer equipment; an accident in the facility's parking lot; or a design defect in the facility that contributes to collateral damage to the surrounding area in the case of a terrorist attack on JDEC. He added that incidents such as this, while unlikely, could happen and that we should have a liability regime in place to deal with them -- just as with any other cooperative activity between governments.

¶3. (SBU) Russian HOD Bavykin said that the existing U.S.-Russian JDEC Joint Statement on Privileges and Immunities (P&I) covered the question of liability. DOD/OGC-Carl Tierney responded that there was individual liability and state-to-state liability and that the P&I Joint Statement protected individuals while the U.S. draft Joint Statement on Liability and Taxation addressed state-to-state claims. Bavykin asked whether the discussion was about state-to-state liability or contractor liability. Arbogast replied that the discussion was about both and that the U.S. wanted a liability regime in place that afforded basic protection while providing a framework for resolving any liability issues that arose. Bavykin responded that he did not see any problem in the state-to-state relationship involving liability - he did not foresee Russia suing the USG during construction - but that in dealing with contractors and subcontractors there needed to be a different model. He added that there would be nothing unusual about the JDEC construction site and that it was not necessary to invent any liability provisions. Liability for contractors should be protected against by insurance (e.g., for car accidents) and governed by Russian law, not an international agreement. Arbogast replied that it was not just a question of contractors because USG employees would be at the site. He added that it was a common feature of government-to-government agreements to have liability provisions and that the plutonium disposition protocol's provisions did not only apply to catastrophic events but also to normal activities that are part of a cooperative effort. It therefore made sense to have these provisions apply to the JDEC's type of cooperative activity. Bavykin again raised the point that if the JDEC did not involve nuclear damage, there was no need to apply the Plutonium Disposition Protocol. He said that the MFA could not go to the Duma and say that Russian or foreign firms would be immune from liability; the MFA could not justify this position.

¶4. (SBU) Arbogast suggested that the discussion focus on government-to-government claims. DOD/OGC-Tierney noted that both the U.S. and Russia were parties to the PfP SOFA in which they had agreed to a state-to-state liability waiver. MOD Col. Il'in said that the PfP SOFA dealt with joint military exercises or operations within the context of the PfP, but that JDEC activities have nothing to do with the PfP and that the JDEC was a bilateral activity whose purpose is

to minimize the risk of use of nuclear weapons. Tierney responded that the USG takes a broader view of the PfP SOFA's application in the sense that the U.S. viewed U.S. personnel in a receiving State as covered by its provisions even if they were not involved in PfP activities. He added that without the JDEC agreements the U.S. would look to the PfP SOFA by default, since it is a multilateral agreement both the U.S. and Russia have agreed to and that Russian personnel in the U.S. for JDEC activities would also be covered by it. Tierney said that the PfP SOFA is a baseline in that if issues arose that were not covered by the U.S. draft Joint Statement, the PfP SOFA would provide guidance. He added that it was a framework among allies - a model for cooperative relations around the world -- that the U.S. was not seeking advantage from its liability provisions and that while there may never be a claim, we need a structure in place just in case claims arise. Bavykin replied that there was agreement on having liability provisions but that the question was what kind of liability provisions were appropriate.

¶15. (SBU) Arbogast noted that the understanding coming out of the June 27-28, 2007, JDEC plenary meeting (reftel) was that the Plutonium Disposition Liability Protocol provisions would be the basis for further deliberations. He asked if the discussion could proceed on that basis and on the basis of Russian comments to the U.S. draft. Col. Il'in responded that it was only agreed at the June 2007 meeting that legal experts should review the Plutonium Disposition Protocol approach. Arbogast replied that the U.S. approach was that both sides have agreed to certain basic liability provisions not only in the plutonium disposition context but also in the PfP context and that the U.S. approach was fair, workable, and took into account the nature of JDEC activities. A lot of hard work had gone into the PuD liability agreement and it does reflect a real cooperative approach, with a great emphasis on consultations. He added that the liability provisions of the U.S. draft were not unique to the plutonium disposition protocol, that these provisions fit the JDEC context, and that they should not be hard to explain to the Duma or anyone else.

¶16. (SBU) Bavykin said that the problem with the U.S. approach was not the waiver of government-to-government liability, but the waiver of liability for contractors and he asked whether Russian firms would be free from liability. Arbogast asked if it was possible to view state and contractor liability separately and that if the U.S. text modified its references to contractors, would the Russians agree to the U.S. draft as it relates to claims against the USG and its employees. Bavykin replied that he would favorably recommend this to his superiors. He added that he did not know whether this would be approved. Arbogast said that this would be a good step forward and that the U.S. would want to see the Russian approach regarding contractors. In summarizing his position, Bavykin said that it was fair to state that (1) both governments would not sue each other in relation to construction work and the activity of the JDEC once it is in place; (2) contractors' activities being predominantly construction or related activities would not be covered by the liability provisions but by provisions of Russian law; and (3) U.S. government personnel working at the JDEC would enjoy the privileges and immunities of U.S. Embassy personnel in Moscow. OSD/MDP - Phil Jamison noted with regard to contractors that it was the U.S. understanding from the JDEC negotiating record that the vast majority of contractor personnel would be Russian subcontractors (not covered by the U.S. draft's liability waiver) with a U.S. prime contractor managing the project. Bavykin responded that it would be necessary to take into account all the elements of our agreements and to look at the situation in terms of a new JDEC site to assess the work responsibilities of the different types of contractors and their liability status. Arbogast said that the U.S. delegation was pleased to have a meeting of the minds on governmental claims.

17. (SBU) At the start of the session, Russian HOD Bavykin gave the U.S. delegation a copy of a four-point paper he had prepared over the lunch break entitled "Preliminary Views on Civil Liability Issues as Possible Grounds to Elaborate Relevant Provisions in a Document to the JDEC Memorandum of Agreement." It included the three points above plus a fourth stating that paragraph 4 of the U.S. draft Joint Statement (which sets out five basic provisions such as non-waiver of sovereign immunity) shall be construed as applying to the two governments only (and not contractors). Arbogast commented on each without agreeing expressly to the formulations, and observed primarily that the provision dealing with contractors and their coverage under Russian law would have to be studied further back in Washington. (NOTE: DoD's Office of General Counsel will assess the Russian position on U.S. contractors to determine whether it is consistent with the protections from exposure for U.S. contractors in other agreements/contexts and what language adjustments might be possible. Both delegations agreed that in any event Russian subcontractors would be subject to Russian law.)

18. (SBU) U.S. HOD Arbogast suggested a brief discussion of where things stood regarding the taxation provisions of the U.S. draft and observed that in the past the Russians had said that once liability was resolved taxation should not be a problem. He asked Bavykin to give a sense of any problems the Russians saw with how taxation was addressed by the U.S. draft. Bavykin said that he was a specialist in liability, that he had not looked carefully at the U.S. taxation language, but that he did not see any major problems and that Col. Il'in could speak to taxation. Col. Il'in noted that the U.S. taxation language was not within the MOD's competence but was within the jurisdiction of the Ministry of Finance. He added that as with the liability language, references to contractors would have to be removed from the taxation language. He also noted that the word "any" would have to be replaced in the sentence mentioning waiver of taxes and fees for any equipment, supplies, materials or services brought into Russia to implement the JDEC MoA. He recommended replacing "any" with "necessary." On the question of removing reference to contractors in the taxation language, Tierney responded that a potential problem with this approach was that it went to the aspect of the JDEC involving shared costs and that the U.S. could end up bearing more costs than Russia.

19. (SBU) Arbogast said that the U.S. delegation would be returning to Washington with the understanding that Russia accepted the U.S. draft with the exception of the bracketed liability language on contractors and that the taxation language would need further review. Bavykin replied that this was basically the case and that his delegation had no problem accepting the approach laid out in the U.S. draft with the adjusted language. Arbogast asked if there would be any Russian adjustments beyond the reference to contractors. Bavykin said the Russians would like to reserve the right to introduce changes in other areas of the draft. He added, that while in principle accepting the concept of the draft, they still wanted to review it carefully and that changes might go beyond what had been discussed but would not challenge the overall approach of the U.S. draft. (NOTE: The PfP SOFA provision (para 9) of the U.S. draft might also end up being a recommended deletion by the Russian side, in view of the strong views expressed by Col. Il'in on the subject.)

10. (SBU) Arbogast inquired as to whether the U.S. could expect a response in two weeks on the taxation provisions. Bavykin replied that it might take more than two weeks to provide a response on liability as well as to get the response of the Ministry of Finance and other relevant agencies. Col. Il'in said that a Russian delegation could not go to Washington in July to discuss JDEC taxation issues and that responses from Russian tax agencies would be conveyed through diplomatic channels. Arbogast raised the possibility of having a meeting on taxation in early August in Moscow if a U.S. delegation went there to discuss JDEC

site facility issues.

11. (U) Participants:

United States

John Arbogast - State Department Office of the Legal Adviser,
Head of Delegation
Phil Jamison - OSD Office of Missile Defense Policy, Deputy
Head of Delegation
Carl Tierney - DOD/Office of the General Counsel
CDR Nadeem Ahmad - Joint Chiefs of Staff Office of Legal
Counsel
Bradley Martin - U.S. Strategic Command
Steve Rosenkrantz - State Department Office of Missile
Defense and Space Policy,
Delegation Executive Secretary
Margaret Hawthorne - Head of Political External Section, U.S.
Embassy, Moscow
Yuri Shkeyrov - Interpreter, Department of State

Russian Federation

Alexander Bavykin - Deputy Director MFA Legal Department,
Head of Delegation
Alexander Borisov - Councilor, MFA Legal Department
Alexandra Kotsuybinskaya - MFA Legal Department
Vladimir Lapshin - Senior Councilor, MFA North America
Department
Sergey Kashirin - Councilor, MFA Security and Disarmament
Affairs Department
Col. Yevgeny Il'in - MOD
Col. Vadim Stalinsky - MOD
Col. Viktor Grigorenko - MOD
RICE